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May 12, 2004

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *In the Matter of Petition for Forbearance of the Verizon Telephone Companies,* CC Docket No. 01-338; *In the Matter of SBC Communication Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 03-235; *In the Matter of Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 03-260.

Dear Ms. Dortch:

I write on behalf of AT&T Corp. ("AT&T") to address Verizon's *ex parte* filing of May 3, 2004 in the above captioned proceedings.[1] Verizon purports to address the proper application of Section 10(a) to its "broadband" forbearance petition. In fact, Verizon's latest filing only confirms both that Verizon cannot satisfy the Section 10(a) forbearance criteria and that it has provided neither the legal nor factual basis that would allow the Commission to undertake anything approaching the required "painstaking analysis of market conditions" supported by record evidence.[2]

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[1] *Ex Parte* Letter from Dee May, Verizon, to Marlene Dortch, Secretary, FCC (filed in WC Docket 02-112 and CC Dockets 02-33, 01-337, 01-338 and 02-52 (filed May 3, 2004)) ("*Verizon Ex Parte*").

[2] *WorldCom, Inc.* v. *FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001); *see also* First Report and Order, *Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, 15 FCC Rcd. 17414, ¶ 13 (2000) ("*Wireless Forbearance Order*").

First, Verizon's arguments addressing §10(a) repeatedly rest on the plainly incorrect assertion that the Commission can use its forbearance power to "increas[e] consumer costs today" in order to "stimulate technological innovation" or to achieve policy objectives in "broader markets." *Verizon Ex Parte* at 7 (internal quotation omitted). Similarly, Verizon claims that "short-term consumer effects do not bar forbearance" because "the best means of promoting consumer welfare in the long term is to take steps needed to promote facilities-based competition." *Id*. at 3, 6. These arguments simply ignore the controlling statutory language. To grant the petition, the Commission must determine that, in the absence of the existing regulation, Verizon's "charges, practices, classifications, or regulations" will be "just and reasonable" and not "unjustly and unreasonably discriminatory." § 10(a)(1). This requirement is separate from the public interest balancing test of § 10(a)(3), and it bars the Commission from permitting unreasonable rates – even if it were to do so in pursuit of longer-term benefits in other markets or for future consumers. Section 10(a)(1) thus bars Verizon's "trade off" between short-term consumer harms and longer term policy benefits. The cases that Verizon invokes, in contrast, address the Commission's general powers to "trade-off" various interests under its general "public interest" powers or the § 251 unbundling standard, which the Commission has construed as a rather open-ended balancing of impairment with other Commission policies.[3] *See* 47 U.S.C. § 251(d)(2) ("the Commission shall consider, at a minimum," impairment). But the Commission has no such authority where, as here, it must apply a specific legal standard, such as § 10(a)(1), that does not permit such open-ended determinations.

Second, Verizon also ignores the relevant statutory language when it attempts to argue that unreasonable and discriminatory practices directed to "*wholesale*" customers are irrelevant for purposes of § 10(a). Verizon argues (at 4) that § 10 "nowhere mentions wholesale competition" and claims (at 3) that § 10(a)(1) is limited to "the services provided to consumers," but the statute cannot bear these distortions. Instead, § 10(a)(1)'s language clearly encompasses *all* "charges, practices, classifications, or regulations" for any carrier or any "telecommunications service." The applicable test – requiring the Commission to determine whether charges will be "just and reasonable" and not "unjustly or unreasonably discriminatory" – is derived from sections 201 and 202, which the Commission has, of course, always applied just as much to wholesale services as to retail services. There was accordingly no reason for Congress specifically to address "wholesale" rates in section 10 when it used familiar phrases that apply equally to wholesale and retail services. In all events, Verizon's position cannot be reconciled with the Commission's past forbearance precedents, which routinely assess the impact of proposed forbearance on wholesale customers and services. Indeed, the Commission has squarely held that a forbearance request must be denied if "forbearance would be likely to raise prices for interconnection and UNEs (particularly those that may constitute bottleneck facilities),

[3] *See* Verizon *Ex Parte* at 6-7 (citing *United States Telecom Ass'n v. FCC*, 359 F.3d, 554, 579, 581 (D.C. Cir. 2004) ("*USTA II*"), and *Consumer Elec. Ass'n v. FCC*, 347 F.3d 291 (D.C. Cir. 2003)).

inputs competitors must purchase from incumbent carriers in order to provide competitive local exchange service."[4] Thus the Commission denied requests for forbearance of dominant LEC depreciation requirements, because the "result of forbearance" would "be higher costs for competitive carriers which could impair their ability to enter and compete in local markets" and would "adversely affect competition by raising input prices that competitors pay," thereby "retard[ing] competition." *Id*.

Moreover, even if Verizon's effort to read wholesale services out of § 10 did not run aground on the plain statutory text and Commission precedent, that approach would have remarkably perverse results. Section 10(a)(1)'s inquiry is clearly based on the nature of the forbearance relief requested under § 10(a): For a petition to forbear from applying "any provision of this Act to a telecommunications carrier or telecommunications service," § 10(a), the Commission must, under § 10(a)(1), address the lawfulness of the practices of "*that* telecommunications carrier or telecommunications service[]." If, as Verizon would have it, § 10(a)(1) is inapplicable to wholesale services and Verizon's charges and practices in relation to them as a carrier, then it must follow that those same matters are carved out of § 10(a) itself, and that the Commission has no forbearance authority with respect to such matters. Thus, if Verizon can petition for relief from a statute applying to its wholesale service or its practices in relation to them, then those matters are plainly relevant to and must be addressed as part of the Commission's implementation of § 10(a)(1).

Verizon compounds its errors in this respect by arguing (at 5) that Congress "did not intend" the "absurd result" of barring the Commission from "relax[ing] unbundling obligations after it finds they harm the public." To begin with, Verizon incorrectly characterizes the Commission's § 251(d) determination, which was not an all-purpose finding applicable to Section 271 (much less § 10), as the Commission itself has already concluded. *See Triennial Review Order*, ¶ 655 (§ 251 and 271 operate independently). Moreover, Section 271(d)(4), which barred the Commission from limiting the checklist items "by rule or otherwise," shows precisely what Congress' intent was in this respect. The absurd result here would be for the Commission to use its general forbearance power to achieve a result that Congress specifically prohibited.

Verizon's exclusive focus on retail services would also place the Commission in an impossible position regarding future forbearance proceedings, including those that might address the implications of the Ninth Circuit's *Brand X* decision. Verizon's "retail only" approach would have the Commission consider the reasonableness and non-discriminatory nature of only retail DSL or cable modem services in assessing forbearance petitions directed at wholesale access obligations. But forbearance is available only as applied to "telecommunications

[4] *1998 Biennial Regulatory Review - Review of Depreciation Requirements for Incumbent Local Exchange Carriers*, 15 FCC Rcd. 242, ¶¶ 54, 63, 68 (1999) ("*1998 Biennial Review Depreciation Requirements*").

services" and "telecommunications carriers," § 10(a), and, under Verizon's view, *retail* broadband internet ervices are information service and in that capacity Verizon is an information service provider, not a telecommunications carrier. Only by addressing the wholesale service, which is the only indisputably telecommunications service at issue, can the Commission avoid either acceding to the view that retail DSL is a telecommunications service or otherwise limiting its ability, through forbearance or otherwise, to address the implications of *Brand X*. And the poor record developed by Verizon to support its requested relief in *this* proceeding would only make more vulnerable any Commission decision here that attempted to grant forbearance by examining only the market conditions surrounding retail information services rather than the wholesale telecommunications services more directly at issue. Indeed, for similar reasons, Verizon's argument would have the further implication of potentially interfering with the Commission's ability to use § 10 to address regulations applicable to any VoIP services that the Commission concludes are information services.

Third, Verizon's digression (at 1-2) regarding the scope and implications of the Commission's *Triennial Review Order* impairment findings is both irrelevant and wrong. It is irrelevant because any Commission finding of non-impairment would not suffice to support a finding that the standards of § 10(a) are satisfied: the absence of an impairment finding does not suggest that, in the absence of § 271's requirements, consumers would generally be protected or Verizon's charges and practices would be reasonable and not unjust or unreasonably discriminatory. *See* § 10(a)(1)-(2). As noted above, the general policy determinations available to the Commission under the Act and § 251(d)(2) permit the Commission to find no impairment without finding that particular charges and practices in all relevant markets are just, reasonable, and non-discriminatory. In contrast, a finding of impairment makes impossible any conclusion that § 10(a)'s tests are satisfied. The Commission could not find that competitive conditions are such that carriers are impaired without access to unbundled network elements under § 251(d)(2) and then find for purposes of § 10(a)(1)-(3) that, in the absence of unbundling, rates and practices would nonetheless be reasonable and non-discriminatory, consumers would be protected, and the public interest would be served.

Verizon is also wrong (at 1) when it claims that the Commission did not make impairment findings with respect to hybrid loops and fiber to the home ("FTTH"). In addressing hybrid loops, the Commission concluded that "we find that competitive LECs are impaired on a national basis without unbundled access to a transmission path," found that impairment "partially diminishes" as a result of fiber deployment, and addressed three factors "balanced against this impairment." *Triennial Review Order*, ¶ 286; *see also USTA II*, 359 F.3d at 554 ("The Commission found some degree of impairment"). Verizon now claims that the Commission found that alternatives available to competitive LECs address the impairment the Commission found to exist, but the USTA II court has already rejected that argument. *See id.* at 582 ("[w]ith regard to loop alternatives, … we understand the Commission to say only that they are a partial substitute; they will mitigate, not eliminate, CLEC impairment"). Nor is it so, as Verizon claims (at 1), that "the Commission found no impairment at all" for FTTH loops. "For FTTH loops, the

Commission found relatively *little* impairment," *USTA II*, 359 F.3d at 583 (emphasis added), but it did find *some* impairment, which is, again, fatal to Verizon's section 10(a) claims. *See also Triennial Review Order*, ¶ 273 ("the level of impairment varies to some degree depending on whether such loop is a new loop or a replacement of a pre-existing copper loop"). As for packet switching, the only real debate in the *Triennial Review* proceeding was with respect to the packet switching capabilities of *hybrid loops*, for which, as noted, the Commission made express impairment findings.

Fourth, Verizon's arguments would also limit the Commission's flexibility in pending proceedings addressing broadband regulation and particularly the application of the *Computer Inquiries* nondiscrimination and unbundling requirements to broadband services. Verizon claims (at 6) that *Computer II* and *Computer III* regulations "subject [Verizon] to a wide range of regulatory requirements, including the obligation to offer transmission components of its broadband services separately, under tariff, at regulated rates." In its next breath, however, Verizon notes (also at 6) that these obligations should be eliminated and asserts that "that determination will be made separately from the issue here." The issues are hardly separate. The Commission could not grant relief from § 271's requirements predicated on the continuing constraints imposed by *Computer II* and *Computer III* and then proceed to eliminate those requirements. Adopting Verizon's arguments here would almost certainly render arbitrary any subsequent deregulatory relief in proceedings addressing *Computer II* and *Computer III*; by the same token, proceeding to grant deregulatory relief in the wireline broadband proceedings would, by Verizon's own formulation, eliminate the basis for granting forbearance here.

Finally, Verizon's *ex parte* confirms that the Commission has before it no record basis that would support an order granting the relief Verizon seeks. At a minimum, the Commission must have before it a record that establishes with particularity the competitive effects and conditions that would exist in each particular market affected by a grant of forbearance. With respect even to traditional, mass market *residential* broadband services provided by cable system operators and Verizon, the record is woefully inadequate. Even if cable systems (which offer no generally available wholesale access) were a sufficient source of retail (duopoly) competition here, Verizon's own filing (at 9) confirms that some geographic areas will be served by DSL but not cable systems. This figure is bound to *increase*, not decrease in the manner that Verizon speculates – due to the simple fact that DSL systems are being rolled out to new geographical *areas* much faster than are relatively mature and stagnant cable systems, and DSL-capability is increasingly being extended to the rural and remote areas least likely to be served by cable systems.

For traditional DSL services provided to business customers, too, Verizon's *ex parte* confirms the inadequacy of the record support for any grant of forbearance relief. Verizon avoids the difficult issues here by conceding (at 11-13) that its evidence applies only to "broadband mass market" and by further limiting the evidence it relies upon to that concerning only the smallest business customers. Of course, § 271 applies to loops serving large, medium and small business customers, and Verizon is in the overwhelming number of cases the monopoly provider of loop facilities to many larger business customers.[5] Cable systems are least likely to serve business areas and most likely to serve residential areas, where many of the "small office/home office" businesses are located. Verizon's business market "evidence" is limited in just this manner. Verizon focuses on cable use by only the smallest businesses. For businesses with more than 5 employees, and even more so for businesses with over 25 employees, the record evidence is, to be kind, exceedingly slim. And contrary to Verizon's suggestions (at 9, 12), it is Verizon's burden to establish the record basis for a grant of forbearance in all affected markets[6] – not AT&T's burden to show that forbearance would be harmful in all markets, or indeed in any market.

For the next generation, advanced services that Verizon invokes to justify the relief it seeks, Verizon provides absolutely *no* evidence that such services would be provided on just, reasonable, and non-discriminatory terms at even the retail level. Verizon does not describe these service or provide any evidence or reasoning that would permit the Commission to make the § 10(a)(1)&(2) determinations in relation to them. Nor does or can Verizon argue that cable competition is relevant in this respect. The much-touted next generation services provide, by definition, capabilities far beyond those that existing DSL – and comparable cable modem services – are capable or delivering to consumers. Verizon's continuous invocation of advanced and next generation capabilities is, accordingly, double-edged: If forbearance in this context would in fact have any bearing on development of facilities that would enable delivery of these next generation services (a matter Verizon asserts rather than demonstrates), then the Commission is obliged to consider whether, absent the § 271 requirements, those services would be offered on just and reasonable terms and on a non-discriminatory basis. The record clearly fails to support the relief Verizon seeks in this respect as well.

Sincerely,

/s/ David L. Lawson
David L. Lawson

cc: Austin Schlick
Linda Kinney
John Stanley
Jeff Dygert

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[5] *See* AT&T Petition for Rulemaking, RM No. 10593, Thomas Decl. (Oct. 15, 2002); WorldCom Comments, RM No. 10593, at 8-9.

[6] *See Wireless Forbearance Order*, 15 FCC Rcd. at ¶ 13.

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